89-1009

No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PEDRO TALAMAS,

Petitioner,

vs

UNITED STATES OF AMERICA,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS FOR REVIEW

I. WAS THE TEST OF "MANIFEST NECESSITY" MET BY THE TRIAL COURT'S DECISION THAT ALLEGED PREJUDICIAL MEDIA COVERAGE INFLUENCED THE JURY AND THAT INCURABLE JUROR BIAS EXISTED?

II. DID THE REVIEWING PANEL SCRUTINIZE THE RECORD WITH THE "HIGH DEGREE" OF NECESSITY THAT IS REQUIRED?

III. WAS THE VALUED RIGHT TO HAVE HIS TRIAL COMPLETED BY A PARTICULAR TRIBUNAL, CONSIDERED AND APPROPRIATELY APPLIED BY THE TRIAL COURT?

IV. DOES STRICT SCRUTINY REQUIRE A COMPARATIVE ANALYSIS BETWEEN THE EVIDENCE IN THE RECORD AND THE EXERCISE OF DISCRETION BY THE TRIAL COURT?

V. DID THE COURT'S DECISION CONFLICT WITH DECISIONS OF THE FIFTH CIRCUIT COURT, OTHER CIRCUIT COURTS AND THE UNITED STATES SUPREME COURT?

LIST OF PARTIES

IN APPELLATE COURT

PEDRO TALAMAS,

JOHN CARY,

H. LEE BAUMAN,

Appellants,

UNITED STATES OF AMERICA,

Appellee.

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REFERENCE TO OPINIONS OF LOWER COURTS

The opinion of the Fifth Circuit Court of Appeals, the order denying Rehearing En Banc, and the District Court's order denying defendant's motion to dismiss are all reproduced in the appendix.

JURISDICTIONAL STATEMENT

This case should be reviewed on writ of certiorari since the Fifth Circuit Court of Appeals has decided a question of Fifth Amendment Right that is in conflict with the applicable decisions of the United States Supreme Court. The Appeals Court decision was rendered on October 20, 1989, and the Suggestion for Rehearing En Banc was denied by the court on November 21, 1989.

The Appeals Court decided an issue dealing with Double Jeopardy on grounds that are

inconsistent with the views of the United States Supreme Court, The Fifth Circuit Court, and other Circuit Courts of Appeals. The settlement of this question will be important to the public at large by establishing a clear and concise rule of law in regards to "Manifest Necessity".

Jurisdiction for writ of certiorari is granted by Title 28, United States Code, Section 1254(1), and United States Supreme Court Rule 17.

The jurisdiction in the Circuit Court of Appeals was Title 28, United States Code 1291, which makes the denial of a motion on grounds of double jeopardy a "final decision", and is immediately appealable and Abney v. United States, 431 U.S. 651, 655-56 (1977).

CONSTITUTIONAL PROVISION

The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution states:

> "[N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb."

STATEMENT OF THE CASE

The jurisdiction of the district court was invoked pursuant to the indictment filed in the United States District Court for the Southern District of Texas, Houston Division.

References herein shall be made to the transcript record of the trial and hearing on Motion to Dismiss, by the designation "RT".

On April 15, 1987, the appellants were indicted, along with multiple co-defendants, by a federal grand jury, charging appellants with conspiracy to import a Schedule II controlled substance, to wit: cocaine, conspiracy to possess with intent to distribute a Scheduled II controlled substance to wit: cocaine, all in violation of Title 21, United States Code, Section 841(a)(1), b(1)(a), (b)(1)(B), 952(a) and 960. Appellants were charged in four (4) counts of the indictment.

A superseding indictment was filed on September 2, 1987. Subsequently, the appellants were arrested and trial was set.

On January 9, 1989, all parties, including Appellants Cary and Talamas, were present for trial in the Court of the Honorable Kenneth M. Hoyt, United States District Judge for the Southern District of Texas, Houston Division. However, co-defendant Hiram Lee Bauman appeared in court without his court appointed attorney, Mr. Randy Holzapple, who was not present due to a scheduling conflict with a trial proceeding in state court. [TR Vol. 1 1-6, 1-7, 1-8, 1-9]. Defendant Bauman repeatedly asked for either a continuance, a severance, or to have his attorney present, and each request was subsequently denied by the Court.

Prior to the commencement of this case, the local media had given coverage to the facts concerning the case and had continued to cover the story as the voir dire proceedings began.

Prospective jurors were interviewed concerning any publicity about the case which they had been exposed to, and in particular, publicity as to those charges against Appellants Cary and Talamas [TR Vol. 1, 1-98, 1-111]. It was discovered that due to the media coverage, certain prospective juror had been influenced to a certain degree in their feelings toward the Appellants [TR Vol. 1 1-112, 1-113]. All of the jurors that had formed opinions, favored the Government. None of these potential jurors were chosen.

All parties were satisfied with the jury as sworn, and the jury was without objection or challenge [TR Vol. 1, 1-152, 1-153].

On January 10, 1989, opening statements were given, but not before Defendant Bauman objected to the trial going forward without his attorney being present [TR Vol. II, 2-5]. On this date, two (2) witnesses for the Government testified and both were subjected to cross-

examination by Appellants. Despite the dilemma facing the Court concerning Defendant Bauman, Appellants were aggressively moving forward with their defense.

On January 11, 1989, it came to the attention of the Court that Mr. Darryle Campbell, the attorney for co-defendants Pablo Bravo and Mario Ginoris had been arrested the day before (January 10, 1989), pursuant to an arrest warrant based upon bribery charges in State District Court in Harris County, Texas [TR Vol. III, 3-3]. During the process of being booked into jail, Mr. Campbell was seen by his two (2) clients who were being returned to the Harris County Jail at that time [TR Vol. III, 3-3]. The Court, obviously concerned with the arrest, called a conference to determine what effect the arrest of Mr. Campbell would have on his clients, as well as the trial itself [TR Vol. III, 3-4]. An interview was held with both Defendants Bravo and Ginoris, in the presence of the Court, and it was determined that both

Defendants desired to continue with Mr. Campbell as their attorney in this trial [TR Vol. III, 3-16, 3-17].

The Court then held a discussion with the jurors, outside the presence of the attorneys and the Defendants, to discuss whether any of them had been exposed to anything in the local media concerning the arrest of Mr. Campbell [TR Vol. III, 3-17]. Based on this discussion, the Court determined that the jury had not been exposed to any stories relating to the arrest that would prejudice the trial and was therefore satisfied that the trial should continue [TR Vol. III, 3-19, Excerpt p.3].

Following the Court's statement that it was confident in going forward with the case, the Court turned its attention to Defendant Bauman. On this same day, January 11, 1989, Bauman filed a Motion For Mistrial, continuance and severance [TR Excerpts p.4]. Attached to this motion was an affidavit by Defendant Bauman's attorney,

Randy Holzapple. In this affidavit, Mr. Holzapple stated that he did not advise his client (Bauman) of the conflicting trial setting he had in state court.

Outside the presence of the jury, the Court then admitted to all the parties that it had been proceeding under the belief that Defendant Bauman had chosen an attorney with a conflict in order to force a continuance, and based upon this erroneous belief, the Court had denied all motions previously made by Bauman for continuance and/or severance [Excerpt p.4]. The Court, now aware of the true circumstance, decided some action would now have to be taken on behalf of Defendant Bauman, and that would be to declare a mistrial [Excerpt p. 4-5].

Appellants Cary and Talamas expressed to the Court their objection to a mistrial, stating that a jury had been chosen, testimony had been given and that they were satisfied with the state of the trial. With the belief that if any harm

had occurred, it was just to Defendant Bauman, Appellants additionally requested a severance so that the trial could continue [TR Excerpt p.7].

The Court made the following ruling in granting a mistrial as to all Defendants:

> "My opinion that the economy, for judicial economy I cannot piecemeal this case. There is no reason for me to try this case in two or three pieces of two weeks a piece when all the evidence and all the exhibits could get lost or misplaced." [TR Excerpt p.20].

The Court, after again repeating that a mistrial had been granted, stated, "my attitude would be that I want to try this case as one case and have it resolved as one case." [TR Excerpt p.23].

All parties returned to the courtroom and the Court explained to the members of the jury that a mistrial had been granted and they were being dismissed [TR Excerpt p.30]. Again, in open court, Appellants Cary and Talamas

objected to the dismissal of the jury and objected to a mistrial being declared as to all parties, stating that neither Cary nor Talamas had requested the mistrial and objected to being mistried. [TR Excerpt p.32].

On January 26, 1989, the Court filed new Findings Of Fact and Order granting the mistrial. Appellant's motions in opposition to the Government's proposed Finding Of Fact and the Court's finding of fact were denied. Appellant's Motion to Dismiss the indictment based upon double jeopardy was denied by the Court.

Appeal to the Fifth Circuit Court of Appeal followed.

REASON FOR GRANTING THE WRIT

The District Court declared a mistrial over the Defendant's objection and later issued a

finding of Fact in the order granting mistrial as follows:

1. That widespread publicity concerning this case had a prejudicial effect. Specifically, newspaper articles concerning Defendant Bauman's courtroom misconduct and arrest of Attorney Campbell.

2. That the alternative to mistrial, i.e., continuance or severance, would not adequately cure the prejudice. (Severance would not cure the taint to the jury occasioned by the pervasive publicity of prejudicial matters, i.e., courtroom misconduct by Defendant Bauman and the arrest of Attorney Campbell.

This postulated prejudice was found although the trial court, at time of mistrial, was obviously satisfied that the jury had not been prejudiced and was scrupulously following the courts admonishment. The court, on the record, stated that it had made inquiry of the jury

whether or not it had seen articles in the news about the case, and the court was satisfied that the jury had not seen anything that would prejudice them.

The present case is appropriate for review by this court because it is one of great importance to the preservation of the constitutional guarantee that a defendant not be placed twice in jeopardy. The issues posed in the appeal and this writ for certiorari should be of gravest concern to district judges, appellate judges, and all who favor the preservation of constitutional liberty.

The constitutional guarantee against twice being placed in jeopardy is a fundamental one, and the burden of two trials also impinges other constitutional guarantees such as effective assistance of counsel, of trial by jury, and of manifest due process.

The important question to be resolved is whether the standard of "manifest necessity" is really the standard to be applied in the Fifth Circuit, and if so, is there a conflict in prior decisions regarding this issue. If a trial judge must apply this standard in declaring a mistrial over a defendant's objection, then this standard should not be nullified by the subterfuge of a standard of review, which allows a district judge to imagine a rationale to justify a patently irrational decision.

The District Court did not carefully consider the rights of Mr. Pedro Talamas. It did not find evidence of jury bias, instead the court simply contrived prejudice to the Defendant in order to rationalize its own desire not to have two (2) separate trials. It merely surmised, contrary to the belief of defendant's counsel and over objection, that prejudice existed.

I. LIMITED SCRUTINY BASED ON RATIONAL BASIS IS NO SCRUTINY. A TRIAL COURT MAY BE ABLE TO RATIONALIZE A VIOLATION OF THE CONSTITUTION, BUT SUCH RATIONALIZATION IS IRRESPONSIBLE.

The violation of any law, even the United States Constitution, may be rationalized by those who violate it. Limited scrutiny on a rational basis is no scrutiny. Even the limited scrutiny standard rationally requires that the standard be exercised responsibly, and to contrive a justification over counsel's objection under the facts of the present case was irresponsible.

Responsibility involves being called upon to answer for one's acts or decisions, to fulfill one's obligations, and to choose between right and wrong. A contrived answer or excuse is none at all. A superficial review of a double jeopardy claim is no review. A statement that "manifest necessity" compelled a mistrial, in light of the facts that it clearly did not, is prevarication, and serves to deprive a presumably

innocent man of his constitutional guarantee against being placed twice in jeopardy is wrong.

II. THE DECISION IS CONTRARY TO UNITED STATES SUPREME COURT STANDARD PERMITTING MISTRIAL ONLY IN EXTRAORDINARY AND STRIKING CIRCUMSTANCES.

Discretion to discharge a jury before it has reached a verdict is to be exercised only in very extraordinary and striking circumstances, Downum v. United States, 372 U.S. 734, (1963).

The record supports the fact that the judge did not apply this standard to this case.

III. THE DECISION IS CONTRARY TO FIFTH CIRCUIT DECISIONS WHICH DO NOT AUTHORIZE A MISTRIAL MERELY BECAUSE OF POSSIBLE PREJUDICE.

If this court will reconsider the facts of this case in light of the material facts and the issue of "Fair Trial", the decision of the trial court cannot be upheld.

The Fifth Circuit in United States v. Evers, 569 F.2d 876 (5th Cir. 1978) states that in applying the "manifest necessity" test to the record, it concluded that the trial judge erred in declaring a mistrial.

> "The voicing of potentially prejudicial remarks by a witness is common, and any prejudice is generally cured efficiently by cautionary instructions from the bench. This Court has expressly suggested the curative instruction remedy as an alternative to a mistrial."

The Court further stated. . .

> "In this case defendant expressly disclaimed any interest in a mistrial. He explicitly stated he wished to have his fate decided by the jury first empaneled and to avoid. 'the anxiety and heartbreak of another trial', the very concern with which the double jeopardy clause deals. See Abney v. United States, 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.2d 651 (1977)."

This is precisely the situation in the case at bar. The defendant wished to go forward and have his fate decided by the jury in the box.

The Fifth Circuit Court's decision in Evers is directly opposite of the decision by the trial court which was subsequently affirmed by the panel reviewing this case.

In United States v. Starling, 571 F.2d 934 (5th Cir. 1978) the court states. . .

> "The Supreme Court has followed the teachings of Perez in two cases involving the possibility of juror bias or prejudice. See, Thompson v. United States, 155 U.S. 271, 15, S.Ct. 73, 39, L.Ed. 146 (1894); Simmons v. United States, 142 U.S. 148, 12 S.Ct. 171, 35 L.Ed. 968 (1891). The Simmons Court concluded that reprosecution is permissible where, before declaring a mistrial, the district court justifiably concludes that it is "impossible for [the] jury, in considering the case, to act with the independence and freedom . . . requisite to a fair trial of the issue[s]." Id. at 155, 12 S.Ct. at 172."
>
> In the absence of . . . a motion [for mistrial on behalf of the accused], the Perez doctrine of manifest necessity stands as a command to trial judges not to foreclose the defendant's option [to proceed to verdict] until a scrupulous exercise of judicial discretion leads to the conclusion that the ends of justice would not be served by a continuation of the proceedings."

The trial court, as in Starling, abused its discretion and in so doing, its decision is in conflict with the law of the Fifth Circuit.

Defendant Talamas thinks the same as the court in **Starling**, at page 941.

> "We think it abundantly plain that the District Court abused the discretion entrusted it by declaring a mistrial. We therefore hold that a second prosecution of appellant is constitutionally barred and that the court erred in refusing to dismiss the indictment." REVERSED AND RENDERED

The Court in United States v. Sandoval, 847 F.2d 179 (5th Cir. 1988) affirmed the trial court's denial of mistrial based upon prejudice to the jury.

The Court stated. . .

> "We turn to the contention that Rodriguez's guilty plea prejudiced the jury. In Almeida-Biffi, the trial court had dismissed the indictment against the co-defendant, Almeida's wife, for lack of evidence. The court then instructed the jury "directly and strongly" that it was not to speculate why the wife had been dismissed. Under these circumstances, we found the defendant had not suffered prejudice."

Again, the Fifth Circuit Court of Appeal upholds the decision that prejudice can and should be cured by instructions to the jury.

IV. WHERE A MISTRIAL IS DECLARED BECAUSE OF ERRORS OR OMISSIONS BY THE COURT OR THE GOVERNMENT RATHER THAN MATTER BEYOND THE CONTROL OF EITHER, THE STANDARD OF REVIEW IS STRICT SCRUTINY.

The panel's decision relies upon Arizona v. Washington, 434 U.S. 497, (1978), to justify the application of "limited scrutiny" in this case. In Arizona, a mistrial was declared because of an improper mistrial by the defense. In the present case, a mistrial was granted due to error by the Court and possible prejudice.

Limited scrutiny was utilized by the panel in reviewing the trial court's decision and "manifest necessity" was reduced to a "high degree" of necessity as the standard for review in this matter, rather than STRICT SCRUTINY, which is required by "manifest necessity".

Carelessness by the Court in allowing Bauman to start trial without a lawyer was certainly within the court's control. This carelessness was the basis of Baumans' behavior and should not be allowed to be utilized as a justification for denying the defendant's their constitutional right to proceed with trial and with the jury chosen.

V. THE PANEL DECISION IS CONTRARY TO THE REASONING IN OTHER APPELLATE COURTS WHICH CAREFULLY BALANCE THE NEED FOR A MISTRIAL AGAINST THE RIGHTS OF THE DEFENDANT TO PROCEED TO TRIAL.

In United States v. Sisk, 629 F.2d 1174, 1178 (6th Cir. 1980) the Court states. . .

> "But a mistrial is not 'manifestly necessary' simple because the trial judge thinks juror prejudice has arisen; on appeal the source of that prejudice must also be considered in deciding whether retrial of defendants is permissible under the Fifth Amendment."

In United States v. McKoy, 591 F.2d 218 (3d Cir. 1979) the Third Circuit speaks of the considerations that must be given the Defendant. . .

> " The Supreme Court recently enumerated some of the significant interests served by the Double Jeopardy Clause in the court's sua sponte declaration of a mistrial over a defendant's objection.
>
> Because jeopardy attaches before the judgement becomes final, the constitutional protection also embraces the defendant's valued right to have his trial completed by a particular tribunal. The reasons why this 'valued right' merits constitutional protection are worthy of repetition. Even if the first trial is not completed, a second prosecution may be grossly unfair. It increases the financial and emotional burden on the accused, prolongs the period in which he is stigmatized by an unresolved accusation or wrongdoing, and may even enhance the risk that an innocent defendant may be convicted. The danger of such unfairness to the defendant exists whenever a trial is aborted before it is prosecutory is entitled to one, and only one, opportunity to require an accused to stand trial. Arizona v. Washington, 434 U.S. 497, 503-505, 98 S.Ct. 824, 54 L.Ed.2d 717 (1978)."

In a Second Circuit case, United States v. Gaggi, 811 F.2d 47 (2nd Cir. 1987) the court had to deal with newspaper and television publicity during the trial. It is not an uncommon occurrence for a notorious trial held in Metropolitan New York to engender extensive publicity. The Second Circuit has established guidelines to be followed:

1. Determine whether the coverage has a potential for unfair prejudice.

2. Canvass the jury to find out if they learned of the potential prejudice.

3. Examine individually exposed jurors, outside the presence of the other jurors, to ascertain how much they know and what effect, if any, on their ability to decide the case fairly.

In Gaggi, two murderers were committed during trial which were connected to the

defendant's who were on trial. The Court found that no prejudice existed and did not stop the trial.

The Court stated. . .

> "It is the impartiality of the jurors-- not the quantum of publicity -- that determines whether the trial proceedings may be fairly conducted. Dobbert v. Florida, 432 U.S. 282, 303, 97 S.Ct. 2290, 2302, 53 L.Ed.2d 344 (1977). Further, while appellants correctly observe that the jurors were exposed to references that Judge Duffy had properly sought to avoid, they fail to demonstrate how these concerns were not ameliorated by the two individual voir dires. As the Supreme Court has cautioned, 'the Constitution 'does not require a new trial every time a juror has been placed in a potentially compromising situation.

In United States v. Smith, 790 F.2d 789 (9th Cir. 1986) the court dealt with newspaper publicity as follows. . .

> "On May 16, 1985 an article appeared on page A-24 of the Honolulu Star Bulletin under the headline; 'Alleged Member of Counterfeiting Plot Goes on Trial After Changing His Plea.' On May 21, 1985 defense counsel brought

the publication of this article to the court's attention. At counsel's insistence, the court agreed to voir dire the members of the jury as to whether they had read the article. The trial judge stated that he intended to question, alone and in camera, any juror who responded in the affirmative. Three jurors and one alternate admitted having read the headline, but all denied having read the article. The four assured the court that despite having read the headline they could 'sit as fair and impartial' jurors. Defense counsel moved for a mistrial. The motion was denied."

The Appeals Court affirmed the trial court's decision to not mistry the case.

The Eleventh Circuit in United States v. Cousins, 842 F.2d 1245 (11th Cir. 1988) affirmed the trial court in denying a motion for mistrial by Cousins. . .

"After the district court discussed with counsel how best to determine whether any jurors were prejudiced by the incident, the following questions were asked of the jurors:

THE COURT: Do any of you at this time, feel that the incident you have described

and told us in open court was prompted or instigated by either the government or the defendant? Any of you fell that way?

THE JURY COLLECTIVELY: No.

THE COURT: Secondly, will the incident in any manner enter into or affect your consideration of the merits of this case?

THE JURY COLLECTIVELY: No.

THE COURT: Thank You.

Satisfied with these responses, the district court permitted the trial to proceed. Prior to the evening recess, the jurors were instructed "not to discuses this case or anything about this case amongst yourselves or with anyone else. Please do not read, listen to, or watch any news accounts."

High profile trials such as Ollie North, Leona Helmsley and the Marcos'es, generated

tremendous amounts of news media pretrial publicity and publicity during trial. This publicity was far greater than the instant case ever was or could have ever generated.

None of the aforementioned trials, in spite of the great amount of daily publicity were aborted by the trial court due to actual or anticipated prejudice based upon publicity.

VI. STRICT SCRUTINY REQUIRES A COMPARATIVE ANALYSIS BETWEEN THE EVIDENCE IN THE RECORD AND THE EXERCISE OF DISCRETION

The Court, in the panel opinion, found that the trial judge did not abuse his discretion in declaring a mistrial over the objections of Appellant. The Court recognized that they are bound by the findings of fact, but may also consider the record as a whole. Grandberry v. Bonner, 653 F.2d 1010 (5th Cir. 1981).

Indeed, strict scrutiny requires a comparative analysis of the record with the findings.

Strict scrutiny also includes an analysis between the Court's oral findings at the time of the mistrial and the written findings which were made after the Government submitted proposed findings of fact. The oral findings were well supported by the record. On the other hand, none of the later written findings were actually supported by the record. The Appeals Court found that they were not restricted to examining only the initial findings, but can instead consider all of the findings made by the trial court. While this is true, strict scrutiny requires that the Court reject the findings that have no support in the record. An example of such unsupported findings is the assertion that the Appellants had been prejudiced and therefore should have been mistried.

When the trial court attempts to explain the rationale for its decision, it may not disregard the facts and evidence in the record.

The Fifth Circuit Court in United States v. Starling, 571 F.2d 943 (5th Cir. 1978) held that while the District Court is not obligated to conduct an inquiry to determine the total extent of the prejudice, however, when the court conducts such an inquiry it may not ignore its findings. To do so would result in an abuse of discretion.

In Grandberry v. Bonner, supra, the Court examined not only the findings made by the trial court but carefully considered the record as a whole.

> "The case before us today clearly bears a strong resemblance to Jorn and Starling and looks very little like Cherry. The trial judge in this case concluded the colloquy with Mr. Noah and then, without addressing either counsel and without pausing long enough for an objection to be registered, embarked on a rather extended statement in the course of which he declared a mistrial. This is precisely the type of abrupt and precipitate action which indicates, as we noted in Starling, 'a total lack of awareness of the double-jeopardy consequences of the court's action and of the manifest necessity standard. . . and a crucial failure to consider the

> appellant's protected interest in having the trial concluded in a single proceeding.' Starling at 941."

In the instant case, it is obvious that the trial court based its true findings of fact on the issue of judicial economy and without a consideration of double jeopardy consequences or the manifest necessity standard. The record further shows that while the Court briefly considered alternatives, i.e.: severance, that it failed to consider the alternatives in relation to the right to not be tried twice as compared to the desire to not tax the resources of the Court twice.

Looking beyond the findings of fact and into the record indicates that the mistrial was granted without carefully considering and utilizing less drastic alternatives as in United States v. Jorn, 400 U.S. 470 (1971). The panel opinion suggests that Jorn does not require the trial court to sever defendants if possible, but, in fact it does. Jorn requires not only a

consideration of viable alternatives, but also a utilization of those alternatives when practical. Surely, to say that a Court does not have to avail itself of viable alternatives would render meaningless the consideration of those alternatives.

Here, the trial court considered the alternative of severance, but found that it did not want to try the case twice. This analysis put the policy considerations of the Court over and above the constitutional rights of the Appellant. To this extent, the panel decision is in conflict with United States v. Jorn, 400 U.S. 470 (1971) and Grandberry v. Bonner, 653 F.2d 1010 (5th Cir. 1981).

While the trial court may well be free to "re-think" its rationale for a ruling, that new rationale must be based upon the evidence in the record and be in accordance with the law. The Appeals Court expressed reluctance at "shielding criminal defendant's from reprosecution because

of a judge's fortuitous choice of words". However, when a judge expresses his reasoning behind a ruling, it can hardly be called a "fortuitous choice of words".

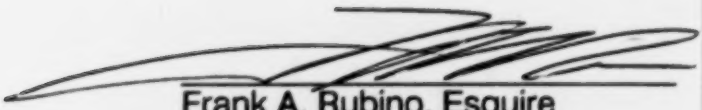
Those words expressed the thinking and reasoning of the Court. The fact that those words do not add up to manifest necessity should not subject a criminal defendant to reprosecution.

CONCLUSION

"A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor." Sup. Ct. R. 17. This is such a case. This Court's power of supervision represents the last opportunity for the vindication of Petitioners' fundamental right against double jeopardy.

DATED: December 20, 1989.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to the Solicitor General, Department of Justice, Washington, D.C., this the 20th day of December, 1989.

Frank A. Rubino, Esquire

PT41/icm

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-2176

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

HIRAM LEE BAUMAN,
PEDRO TALAMAS and
JOHN CARY,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

ON SUGGESTIONS FOR REHEARING EN BANC

(Opinion October 20, 5 Cir., 1989, __F.2d__)

(November 21, 1989)

Before DAVIS and SMITH, Circuit Judges, and LITTLE, District Judge.*

PER CURIAM:

(x) Treating the suggestions for rehearing en banc as petitions for panel rehearing, it is ordered that the petitions for panel rehearing are DENIED. No member of the panel nor Judge in regular active service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate Procedure

and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

( ) Treating the suggestions for rehearing en banc as petitions for panel rehearing, the petitions for panel rehearing are DENIED. The judges in regular active service of this Court having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Federal Rules of Appellate Procedure and Local Rule 35), the suggestions for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

CLERK'S NOTE:
SEE FLAP AND LOCAL RULES 41 FOR STAY OF THE MANDATE.

_____
United States Circuit Judge

REHG-9

* District Judge of the Western District of Louisiana, sitting by designation.

(Reproduced to comply with rules)

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 89-2176

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

VERSUS

HIRAM LEE BAUMAN, PEDRO TALAMAS and JOHN CARY,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas

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(October 20, 1989)

Before DAVIS and SMITH, Circuit Judges, and LITTLE, District Judge.[1]

JERRY E. SMITH, Circuit Judge:

Three defendants seek dismissal of an indictment pending against them after the trial court declared a mistrial. Since all defendants were once put in jeopardy, we must decide

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[1] District Judge of the Western District of Louisiana, sitting by designation.

whether the fifth amendment to the Constitution bars reprosecution under the facts of this case.

Upon review of the entire record, we conclude that the trial court did not exceed its discretion in finding "manifest necessity" for a mistrial. Accordingly, the double jeopardy clause does not constitutionally bar reprosecution over the defendants' objection, and hence we affirm. A retrial may commence with respect to all defendants.

I.

The appellants and several confederates were indicted on April 15, 1987, for a variety of drug-related conspiracy, distribution, and importation offenses. The events surrounding the trial were well publicized, described by the Houston media as the largest drug trial in the city's history. The district judge decided to try all defendants together and set a trial date well in advance to avoid scheduling conflicts commonly associated with trying numerous co-defendants.

Defendant Hiram Lee Bauman, himself an attorney, was provided court-appointed counsel. Problems developed between Bauman and his attorney, however, leading to substitution of appointed counsel on two separate occasions. The district court permitted Bauman to retain attorney Randy Holzapple, his third appointed counsel, several weeks before trial, with the understanding that the trial date of January 9, 1989, would not be continued. Bauman accepted this condition for substitution of counsel.[2]

All defendants appeared in court on the trial date. Because of a so-called "scheduling conflict," however, Holzapple failed to appear. The district court believed, based upon these events, that Bauman had retained Holzapple with full knowledge of the attorney's scheduling

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[2] In his December 19, 1988, motion to substitute counsel, Bauman stated, "This motion is not made for the purpose of delay and there is sufficient time before trial for substitution of counsel and no injustice, prejudice, or obstruction of court procedure will be caused by the substitution." The court granted the substitution, subject to the limitation that "[t]his order shall not become a basis for a continuance in this case."

problem in order to stall the commencement of the trial. The district court offered Bauman the immediate services of his second court-appointed attorney, who was present in court for unrelated reasons, so that the trial could proceed. Bauman rejected the court's invitation and moved that either the case be continued or he be severed.

Sensing bad faith, the district court interpreted Bauman's actions as a calculated attempt to disrupt the trial. Accordingly, the court rejected Bauman's motion for a continuance or a severance and proceeded with the trial in the absence of Bauman's defense counsel, citing this court's decision in United States v. Mitchell.[3] Bauman vehemently objected to the proceedings, believing himself unrepresented in violation of the sixth amendment. He raised the objection at every available oppor-

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[3] 777 F.2d 248, 257-58 (5th Cir. 1985), cert. denied, 476 U.S. 1184 (1986), holding that a trial may proceed without defense counsel if the defendant, in bad faith, retains counsel with a scheduling conflict. The Mitchell court concluded that the right to counsel may be waived if it is purposefully used as an instrument for delay.

tunity, even though the court noted his objection for purposes of appeal and requested Bauman's cooperation.

A jury was empaneled and sworn, and the government began to present witnesses. Bauman, however, proved to be a disruptive defendant. Against the instructions of the court, he repeatedly objected to the lack of counsel before the jury and saw fit to interrupt the examination of government witnesses by seeking the court's permission to leave the courtroom.

Two days after trial began, Bauman moved for a mistrial, continuance, or severance based upon a newly-submitted affidavit from Holzapple stating that Bauman was unaware of his scheduling conflict. That same morning, the court received information that attorney Campbell, counsel for two other co-defendants, was arrested in an unrelated case on charges of conspiring to bribe a justice of the peace and aggravated perjury.

The judge decided to meet with the defendants' attorneys to address the separate problems associated with Bauman's lack of counsel and Campbell's arrest. The defendants offered the court no uniform curative measure for any prejudice that they may have suffered: Campbell moved for a mistrial with respect to his two clients; several other co-defendants sought a mistrial; Bauman desired either a continuance, severance, or "as a last resort," a mistrial; defendants Talamas and Cary lobbied for a severance, but opposed a mistrial. The government, not surprisingly, wanted to try all defendants together and thus sought a mistrial to correct any sixth-amendment error or incurable prejudice visited upon the jury.

Before deciding upon a course of action, the district court then interviewed the jurors to assess any possible prejudicial exposure to news coverage. Prudently, the court made no direct reference to Campbell's arrest so as not to exacerbate any problem with jury bias. At this point in the proceedings, three jurors admitted

to hearing media references to the trial, but they apparently had not paid attention to any details.

After interviewing the attorneys and jurors, and over the objection of Talamas and Cary, the judge declared a mistrial sua sponte as to all defendants. An order, coupled with more comprehensive written findings, was subsequently entered on January 26, 1989. The court found, inter alia, that Holzapple had known he had a scheduling conflict when he accepted representation of Bauman and had failed, in bad faith, to notify the court and to attend the trial on behalf of Bauman. The court was also concerned that past publicity, coupled with expected future media coverage of Campbell's arrest, would incurably prejudice all defendants.

After declaration of the mistrial, defendants Bauman, Talamas, and Cary unsuccessfully moved to dismiss the indictment on the theory that reprosecution is constitutionally barred. A retrial of all defendants has been stayed pending disposition of this interlocutory appeal.

II.

A.

The double jeopardy clause protects a defendant's "valued right to have his trial completed by a particular tribunal." Crist v. Bretz, 437 U.S. 28, 36 (1978). It also bars abusive government conduct designed to harass a defendant through repetitive prosecution or undertaken for the purpose of increasing the likelihood of conviction.[4]

However, the double jeopardy clause is not an absolute bar to reprosecution once the jury has been empaneled and sworn. A defendant may, for example, waive double jeopardy protection by consenting to a mistrial before a verdict is rendered. As noted in United States v. Dinitz, 424 U.S. 600, 607 (1976), "a motion by the defendant for mistrial is ordinarily assumed

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[4] See Arizona v. Washington, 434 U.S. 497, 503-04 (1978) (retrial increases the financial and emotional burden on the accused, prolongs the stigma associated with unresolved charges, and increases the risk that an innocent person may be convicted).

to remove any barrier to reprosecution, even if the defendant's motion is necessitated by prosecutorial or judicial error" (citing United States v. Jorn, 400 U.S. 470, 485 (1971)).

Without the defendant's consent to a mistrial, reprosecution becomes more difficult. Nevertheless, a retrial following a sua sponte declaration of mistrial over a defendant's objection is not prohibited under the fifth amendment where there exists "manifest necessity" for a mistrial. Id. at 606-07. The "manifest necessity" exception, although narrow, frees the trial judge from the "Hobson's choice" of either continuing with a trial that in fairness should be terminated, or declaring a mistrial after jeopardy attaches and reprosecution is barred. See, e.g., Cherry v. Director, State Bd. of Corrections, 635 F.2d 414, 419 (5th Cir. Jan. 1981) (en banc) (manifest necessity for mistrial exists when, for example, judge or juror cannot attend because of illness or death), cert. denied, 454 U.S. 840 (1981).

B.

For purposes of appellate review, the trial court's finding of "manifest necessity" for a sua sponte declaration of mistrial is to be upheld if the court exercised "sound discretion" in making that determination. See Arizona v. Washington, 434 U.S. at 514; Grandberry v. Bonner, 653 F.2d 1010, 1014 (5th Cir. Unit A Aug. 1981). Application of this standard requires appellate courts to give the judge's mistrial order the "highest degree of respect," as he is most familiar with the events that compromised the trial.[5] The availability of alternatives less draconian than a mistrial does not necessarily preclude reprosecution, as reasonable judges may differ concerning proper curative measures. Grandberry, 653 F.2d at 1014; Cherry, 635 F.2d at 418-19.

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[5] Grooms v. Wainwright, 610 F.2d 344, 346 (5th Cir.), cert. denied, 445 U.S. 953 (1980); see also Abdi v. Georgia, 744 F.2d 1500, 1503 (11th Cir. 1984) (where grounds for mistrial involve jury prejudice, decision of trial judge deserves "great deference"), cert. denied, 471 U.S. 1006 (1985).

Additionally, we are free to scrutinize the entire record and are not limited to only those findings made contemporaneously with the mistrial order. See Abdi, 744 F.2d at 1503. This plenary review of the record assists us in determining, as required by our prior decisions, whether the trial judge "carefully considered the alternatives and did not act in an abrupt, erratic or precipitate manner." Grandberry, 653 F.2d at 1014.

III.

A.

The Supreme Court has said that the valued right to be tried before a particular tribunal "is sometimes subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury." Arizona v. Washington, 434 U.S. at 505. However, because the valued right is so important, the government must show "manifest necessity" for any mistrial declared over a defendant's objection. Id.; Baker v. Estelle, 711

F.2d 44, 47 (5th Cir. 1983), cert. denied, 464 U.S. 1048 (1984).[6]

In Arizona v. Washington, the Supreme Court declined to define manifest necessity precisely or to enunciate rules of mechanical application.[7] It offered limited guidance, saying

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[6] We have similarly stated the law on double jeopardy:

> The bar of the double jeopardy clause operates to protect an accused against multiple prosecutions or multiple punishments for the same offense. Jeopardy attaches at the empaneling and swearing in of the jury, and from then on, consideration must be given to the defendant's 'valued right. . . to have his trial completed by the particular tribunal summoned to sit in judgment on him.' When that right is denied by declaration of a mistrial at the behest of the prosecution or on the court's own motion, reprosecution is prohibited unless there is a 'manifest necessity for the [mistrial] or the ends of public justice would otherwise be defeated.'

United States v. Bobo, 586 F.2d 355, 362 (5th Cir. 1978) (citations omitted), cert. denied, 440 U.S. 976 (1979).

[7] "[It is] readily apparent that a mechanical rule prohibiting retrial whenever circumstances compel the discharge of a jury without the defendant's consent would be too high a price to pay for the added assurance of personal security and freedom from governmental harassment which such a mechanical rule would provide." Arizona

only that the "high degree of necessity" mandated by the phrase can be found in a variety of circumstances. See 434 U.S. at 506-09. Thus, the Court left the definition of the phrase deliberately ambiguous, affording the trial judge considerable discretion to declare a mistrial without immunizing a defendant from reprosecution.

The phrase "manifest necessity," first used in double jeopardy jurisprudence in United States v. Perez, 22 U.S. (9 Wheat.) 579, 580 (1824), has over the years been judicially refined to such an extent that it is today somewhat misleading: It implies a greater burden on the government than is actually demanded to achieve a reprosecution after a mistrial. As the Washington Court noted, "Indeed, it is manifest that the key word 'necessity' cannot be interpreted literally; instead, contrary to the teaching of Webster, we assume that there are degrees of necessity and we require a 'high degree' before concluding

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v. Washington, 434 U.S. at 505 n. 16 (citing Jorn, 400 U.S. at 480).

that a mistrial is appropriate." 434 U.S. at 506. Thus, manifest necessity, in modern legal jargon, is equivalent to "a high degree of necessity."[8]

B.

In the instant case, the court and defendants expressed considerable concern over "spillover prejudice" if the defendants were forced to associate with Campbell, recently arrested, and his clients. In addition, all parties agree that Bauman conducted himself in open court in a fashion that frustrated both the judge and the defendants in maintaining order at trial. The defendants feared that Bauman's poor decorum before the jury would have a negative impact upon all of them.

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[8] We note that the trial judge need not make an express finding of "manifest necessity," nor must he expressly state that he considered alternatives and found none to be superior. See Washington, 434 U.S. at 501; Abdi, 744 F.2d at 1503. We need only to be satisfied from the complete record that the trial judge exercised sound discretion in declaring a mistrial, sua sponte, in a factual setting that demonstrates a high degree of necessity for terminating the trial before the jury completes its solemn task of rendering a verdict.

It is apparent from the record that the trial court was concerned about the possibility of a sixth amendment error if the trial had proceeded in the absence of defense counsel for Bauman. The court at first believed that Bauman had sought deliberately to interrupt the progress of the trial by soliciting the absence of Holzapple when the trial date had been agreed to by all parties. However, Holzapple's affidavit, if true, indicated that Bauman had not retained his services in bad faith in order to disrupt the trial.

Aside from problems with representation, the judge and the remaining defendants found Bauman's interruptions and repetitious objections to be potentially prejudicial as to all defendants. This spillover prejudice was exacerbated by widespread news reports of Campbell's arrest. The judge found that the risk of both past and future exposure -- through news reports and juror conversations with friends -- was sufficient to merit a mistrial.

With little difficulty, we conclude that Bauman's double jeopardy appeal is without merit in this case for the simple reason that he requested the mistrial. As noted previously, a motion by a defendant for a mistrial usually removes any barrier standing in the way of reprosecution under Dinitz. His argument that his motion for a mistrial was "a last resort" and that he really wanted a severance or a continuance is unpersuasive.

The double jeopardy defense asserted by Talamas and Cary, however, is not meritless, as they consistently objected to a mistrial. They remind us that they even agreed to stipulate to certain government evidence in order to avoid a mistrial as to them. Moreover, Talamas and Cary argue that United States v. Jorn, 400 U.S. 470 (1971), requires that the district court consider less drastic alternatives and, if possible, to choose a remedy of severance instead. They allege that the judge declared a complete mistrial because of selfish concerns for "judicial economy" in conducting a single trial, and that

such considerations have no place in double jeopardy jurisprudence.

We agree with Talamas and Cary to the extent that they understand Jorn to require the trial court methodically to consider alternatives to a mistrial. However, we reject their argument that the trial court must always agree to sever certain defendants if possible. As noted before, reasonable judges may differ on the proper curative measure, and appellate courts are not meant to second-guess the sound discretion of the trial judge in declaring a mistrial for juror prejudice when that judge is closest to the compromising events.

Moreover, we disagree with defendants' suggestion that the trial judge was concerned solely with judicial efficiency when he terminated the trial. The record reflects that much more was involved. The trial judge expressed concern that bifurcated trials could prejudice subsequent proceedings because of the publicity surrounding this large-scale drug trial. He also feared incurable juror bias resulting from

Bauman's disruptions in front of the current panel. The future impact of Campbell's arrest, about which the jurors were asked only indirectly, was also speculative and thus entitled to great deference.

It is evident to us that the trial court here did not act in an abrupt, erratic, or precipitate manner. He consulted with the counsel of all defendants: Most wanted a mistrial for their clients; all wanted a mistrial with respect to Bauman; no one wanted to be seen with Campbell; and Talamas and Cary wanted a severance only. The court also interviewed all the jurors to assess the extent of juror bias.

The court proceeded to consider the options of a continuance and severance. Contrary to the suggestion of the defendants, his findings concerning alternatives other than a mistrial need not be limited to those contemporaneously made with his mistrial order. In fact, such findings need not even be made expressly. See Abdi, 744 F.2d at 1503 (record need only reflect that alternatives were considered). Nevertheless,

in this case the trial court did in fact enter additional findings, along with his written order, two weeks later. He concluded that a continuance would only expose the empaneled jurors, over the course of a month's delay, to more prejudicial media influence. A severance was similarly rejected because of the fear of incurable prejudice on the part of the current panel, concerns for judicial economy and preservation of evidence, and the express consent of all but two of the defendants for a mistrial.

The fact that the judge's subsequent written findings may have been inconsistent, in whole or in part, with earlier oral findings, as the defendants suggest, is a matter to be considered upon review.[9] We recognize, however, that such changes may be attributable to the judge's access to more information over

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[9] Defendants Talamas and Cary remind us that the judge found no prejudicial bias when he interviewed the jurors but that he did find such bias, or the threat thereof, in subsequent written findings.

time or his quiet reflection upon the unusual events that transpired before him here.

Contrary to what the defendants suggest, double jeopardy jurisprudence does not bar a judge's reassessment of the impact of certain events. Unless we are convinced from our review of the record that the trial judge is belatedly searching for manifest necessity where none existed at the trial's termination, we find no interest to be served by shielding criminal defendants from reprosecution because of a judge's fortuitous choice of words. Thus, the proper analysis focuses upon the complete record and not upon isolated statements of the presiding judge.

IV.

We recognize that other judges may have dispensed differently with the problems presented at trial in the instant case. Nevertheless, we conclude that the trial judge did not abuse his discretion in declaring a mistrial over the objection of two defendants here. Bauman's lack

of counsel and his bizarre behavior before the jury, coupled with Campbell's arrest, was sufficiently prejudicial as to all defendants. The decision to terminate the trial could have been reached similarly by any reasonable judge.

We are satisfied from our review of the record that a high degree of necessity existed for a complete mistrial. We find that the court evaluated, with due deliberation, whether a mistrial or some other curative measure was appropriate. Accordingly, we AFFIRM. A retrial may proceed with respect to all defendants.

(Reproduced to comply with rules)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

UNITED STATES OF AMERICA, Plaintiff, vs PEDRO TALAMAS, (3) JOHN CARY, (5) PEDRO DEVIA, (6) OSCAR OLIVIA, (10) JULIO MACEO, a/k/a EL FLACO, (11) PABLO BRAVO, (13) HIRAM LEE BAUMAN, (15) MARIO GINORIS, (17) Defendants.	CRIMINAL ACTION NO: H-87-93-S

ORDER GRANTING MISTRIAL

BACKGROUND

A trial by jury commenced in this cause on January 9, 1989 with selection of the jurors. The Government began to put on its evidence on January 10. Several events occurred, with two specific events occurring on January 11, leading to the Court's opinion that a mistrial should be granted. Beginning with the first day of trial, January 9, the two major daily newspapers

carried prominent items each day about this trial. Comments by defense attorneys and one defendant were included in these items.

On the morning of January 11, 1989, Darryl Campbell, attorney for defendants Pablo Bravo and Mario Ginoris, appeared in Chambers and informed the Court that he believed that he would not be able to proceed in the trial, although he personally was ready. On January 10th, Attorney Campbell was arrested by State authorities on an indictment charging conspiracy to commit bribe and aggravated perjury. Attorney Campbell requested that the Court employ special counsel to inquire of his clients, Bravo and Ginoris, whether they could proceed with him in light of his arrest. After calling all defense counsel to Chambers and informing them of this dilemma, the Court proceeded to employ special counsel H. Michael Sokolow from the Federal Public Defender's Office to interview defendants Bravo and Ginoris concerning their desire for new counsel and lay opinion regarding proceeding to trial with the current jury.

Following these interviews, the Court determined that limited questioning of the jury was appropriate in light of the fact that both major daily newspapers carried a headline story on Attorney Campbell's arrest and additionally linked him to the case on trial.

Also on January 11, 1989, Attorney Randy Holzapple filed a motion for mistrial and/or severance, stating by affidavit that he, Randy Holzapple, had failed to inform his client, Hiram Lee Bauman, that he had a conflict in trial schedule at the time that he agreed to represent him on or about December 16, 1988. Defendant Hiram Lee Bauman had repeatedly objected to the proceedings and accused the Court of depriving him of his right to counsel. This conduct occurred during voir dire, at the time of opening statements, and on numerous occasions at side bar conferences. The objections were generally made in the presence of the jury panel.

FINDINGS OF FACTS

1. The Court finds that Attorney Holzapple knew that he had a conflict upon taking the case; knew that the Court would not grant a continuance based on his appointment to represent defendant Bauman; and after announcing ready for trial on January 3, 1989, failed to arrange for other counsel to be present for defendant Bauman.

The Court further finds that Attorney Holzapple's conduct was intentional and coupled with defendant Bauman's conduct in Court was designed to prejudice the jury and to undermine the public's perception of judicial neutrality. The Court's observations are reflected by defendant Bauman's and Attorney Holzapple's complaints, published in the Houston Post and Houston Chronicle on the second day of trial. (See attachments A and B to these findings and conclusions). In these articles Attorney Holzapple is quoted criticizing this Court, and suggesting that this Court was responsible for the attorney's failure to appear for trial and

asserting further that defendant Bauman was not being afforded a fair trial by this Court. (See attachment B.) The Court's findings are further reflected in other publicity surrounding this case. Kent Schaffer, attorney for defendant John Cary is quoted in a January 10, 1989, Houston Chronicle article expressing his concern that defendant Bauman's lack of an attorney would have a "spill over" effect which would prejudice the other defendants.

2. Although widespread publicity concerning prominent cases cannot be permitted to stop the wheels of the criminal justice system, the publicity must be examined and weighed for inherent prejudicial effect.

This trial was covered by the two daily local newspapers, at least two of the local television stations, and at least two of the local radio stations. The newspaper articles discuss the nature of the case, the names and sometimes the nationalities of the defendants, summaries of what the testimony will show, the status of co-defendants not on trial, and comments by

defense attorneys. The articles are not always factually correct. The Court finds that, given the nature of the information published, the fact that the information was published during the trial, the sources for the information are often anonymous, and the pervasiveness of the publicity, it was very likely that this information could have reached jurors through comments made to them by family or friends. A further front-page story appeared in the Houston Chronicle four days after the mistrial was declared.

3. The Court finds that the danger of prejudice from the widely publicized arrest of Attorney Campbell pervades the defense of each of the defendants.

The news accounts noted prominently that attorney Campbell had encountered his clients in the jail cell where he was taken after his arrest. This fact was verified by the Court through special counsel appointed to make the inquiry. The Court's concern with prejudice was underscored by the remarks of Attorney Kent

Schaffer who, in violation of the Court's order, stated his view to reporters that the news of the arrest of attorney Campbell could "devastate" the rights of all defendants in the eyes of the jury.

4. The Court met with all defense counsel in open court to rule upon all motions for severance and for mistrial. During these proceedings Attorney Frank M. Rubino, attorney for defendant Pedro Talamas, and Kent Schaffer, attorney for John Cary, informed the Court that they intended to move for mistrial if the Court did not, with respect to Defendants Bravo, Ginoris, and Bauman, either grant a motion for severance or grant a motion for mistrial. Mr. Rubino was emphatic in this respect. Mr. Rubino stated: "Mr. Talamas does not wish to go forward in the same courtroom, most respectfully, with Mr. Campbell because of what we can see to be a continuing problem, a time bomb that we don't know when or if it could go off."

Attorney Campbell moved for severance or mistrial as to Bravo and Ginoris

because he believed that the jury would eventually learn of his problem and hold this against his clients.

Mrs. Nancy Harrison, attorney for defendant Devia, moved for mistrial asserting that the prejudice as to defendant Devia had already occurred. The Harrison motion was joined by Attorney Lee Wilson representing defendant Oscar Olivia and John Garcia, representing Julio Maceo.

5. The Court finds that the alternatives to mistrial i.e., continuance or severance, would not adequately cure the prejudice which permeated the trial but in fact would create additional prejudice. A protracted continuance, allowing new counsel to become prepared for trial, carries the substantial risk of further prejudice to this jury resulting from continuing extensive media coverage. Severance would not cure the taint to this jury occasioned by the pervasive publicity of prejudicial matters, i.e., courtroom misconduct by defendant Bauman and the arrest of Attorney Campbell.

CONCLUSIONS OF LAW

1. The attack on the Court's conduct of the trial and its impartiality, along with the conduct of Attorneys Holzapple and Schaffer in making statements in the press designed either to insure that no fair trial occurred or to point out the difficulty of insuring a fair trial coupled with the publicized arrest of the attorney for defendants Ginoris and Bravo requires entry of an order of continuance, severance, or mistrial. The Court is required to select the least drastic alternative. See U.S. v. Jorn, 400 U.S. 470 (1971); U.S. v. Thompson, 744 F.2d 1065, 1068 (4th Cir. 1984).

2. A continuance carries a risk of prejudice in that at least a 30-day continuance would be required. Prejudice may be presumed where there has been highly inflammatory publicity or intensive media coverage. Bronstein v. Wainwright, 646 F.2d 1048, 1051 (5th Cir. 1981). See also Murphy v. Florida, 421 U.S. 794, 798-99 (1975). During a continuance, a juror could be exposed to persons who have read the

press coverage of this case and who discuss the coverage in the juror's presence. This Court concludes that the publicity attached to this trial was both inherently prejudicial and extensive; therefore, to grant a continuance would carry the taint with the trial.

3. Defendants Talamas, Cary, Devia, Bravo, Bauman and Ginoris are charged in two conspiracy counts. Each is charged with conspiring with the other or unknown parties to import and to possess with intent to distribute large quantities of cocaine.

Granting a severance and proceeding to trial on the conspiracy counts as to part of the defendants would prejudice those parties severed, specifically Bauman, Bravo, Ginoris, Olivia, and Devia. Defendants Talamas and Cary, although strenuously urging severance and objecting to mistrial, did not make a showing of compelling prejudice that would result from the denial of their requests for severance. U.S. v. Horton, 646 F.2d 181, 186 (5th Cir. 1981). In fact, the widespread publicity about this case

would taint the trial of the severed defendants and would be prejudicial to both defendants and prosecutors.

4. The Court's order of mistrial as to all defendants is premised in significant part on its concern for (a) the prejudice on bifurcating the conspiracy counts; (b) the prejudice to defendant Bauman after his attorney Holzapple revealed on January 11, 1989 that he failed to inform defendant Bauman that he could not be available for trial; (c) the efforts by Attorney Holzapple and defendant Bauman to undermine the jury's and public's perception of the Court's neutrality in the trial; (d) the violation of the Court's order by defense counsel Schaffer in discussing aspects of the case with the press; (e) the likelihood of continuing publicity concerning Darryl Campbell and his arrest, resulting in a substantial risk that the jury would be prejudiced by the extensive media coverage; and (f) the response of Bravo that while he wanted Attorney Campbell to continue representing him, he felt

that the jury did or would eventually know and may use it against him.

5. Although the motion for mistrial of Attorney Holzapple was granted, the order of mistrial as to all defendants is required to insure that each defendant receives a fair and impartial trial, to insure that judicial resources are used wisely, and to correct any taint or prejudice that pervaded the trial. These matters could not be corrected through a continuance or severance. In fact, these matters would have been exacerbated by a continuance or severance. Finally, it is well established that in conspiracy cases persons jointly indicted should ordinarily be tried together, U.S. v. Perez, 489 F.2d 51, 65 (5th Cir. 1973), cert. denied, 417 U.S. 945 (1974). It is the conclusion of this Court that this view should prevail under the circumstances presented in this case.

SIGNED this 26th day of January, 1989.

KENNETH M. HOYT
United States District Judge

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